United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7219

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7219

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

- against -

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. § 1292(a)(1) from an order of the United States District Court for the Eastern District of New York, Hon. Walter Bruchhausen presiding, refusing a prelminary injunction. The decision of the District Court is unreported.

ISSUES PRESENTED FOR REVIEW

1. Whether the Chief of Transit Police and the Chairman and members of the Board of the New York City Transit Authority are "persons" within the meaning of 42 U.S.C. § 1983?

2. Whether $10,000 is put in controversy by an action to preserve the historic right of citizens to disseminate political publications in conjunction with peaceful discussion in public places?

3. Whether the First Amendment protects plaintiffs' freedom to sell political publications in person to members of the public and to engage in peaceful discussions in conjunction with such sales, all for the purpose of propagating plaintiffs' political viewpoint rather than for personal gain?

4. Whether the major New York City subway stations are appropriate places for citizens to exercise their First Amendment freedom to distribute political publications by hand to willing recipients?

5. Whether plaintiffs' First Amendment right to sell political publications in person to members of the public is violated by defendants' absolute refusal to allow such selling at any time or place within the New York City subway system?

6. Whether the district court abused its discretion in denying a preliminary injunction which, according to unconflicting evidentiary materials, would halt an ongoing violation of plaintiffs' constitutional rights while threatening no harm to defendants or the public interest?

STATEMENT OF THE CASE

This is a civil rights action founded on 42 U.S.C. § 1983 and the First Amendment. Plaintiffs are members of a socialist political party who desire to sell copies of socialist newspapers in person in New York City subway stations, as a means of communicating the ideas and programs of their party and its electoral candidates. The defendant

public officials have prohibited plaintiffs from doing so. Defendants' ban extends to all times and places within the subway system. Plaintiffs are threatened with criminal penalties if they violate defendants' prohibition.

Proceedings Below

On February 21, 1975, plaintiffs filed their complaint. (App., p.2a) Plaintiffs requested a declaratory judgment that they are constitutionally entitled to sell copies of the newspapers in person in the subway stations of the New York City Transit Authority, subject to reasonable regulations as to time, manner and place. Plaintiffs also requested a permanent injunction restraining defendants and their subordinates from interfering with such sales. (App. p.6a)

On February 24, plaintiffs moved for preliminary injunction restraining defendants from continuation of the absolute prohibition against personal selling at any time or place. (App. p.8a) The district court denied the motion on three grounds, namely that the court lacked jurisdiction of the subject matter, that the restraint on plaintiffs' freedom to sell papers does not amount to irreparable

injury, and that the total ban on personal selling at all times and places within the subway system is a legitimate regulation of the time, manner and place of exercising First Amendment rights (App. p.28a).[1/] This appeal followed. (App. p.31a).[2/]

Plaintiffs moved this court for an injunction pending appeal and, on April 22, 1975, the motion was denied without opinion by Judges Mulligan, Timbers and Hays.

1/ There was no dispute as to the material facts and, perhaps for that reason, the court made no findings of fact. (Id.) An evidentiary hearing was not requested by either side or by the court, and the motion was argued and decided on the basis of affidavits and briefs.

2/ If the district court had based its decision entirely upon its holding that plaintiffs failed to show the irreparable injury needed for preliminary relief, plaintiffs might well have proceeded directly to trial, rather than pressing this time-consuming appeal. However, it would have been futile for plaintiffs to continue in the district court in view of its adverse ruling on the merits and, especially, its holding that it lacked subject matter jurisdiction of the case. The latter holding requires immediate dismissal of the action, F.R.Civ.P. 12(h)(3), and hence, under the district court's ruling, it was powerless to proceed to trial of other issues. Similarly, unless this court disagrees with the district court's conclusion as to subject matter jurisdiction, this court is powerless to pass upon the other issues presented on appeal.

Facts

The evidentiary record is contained in affidavits with exhibits submitted by both sides. These materials are not in conflict as to the essential facts stated below.

Plaintiffs are local members of the Socialist Workers Party (SWP). (App. pp.10a,14a).

Defendants are the chairman and members of the board of the New York City Transit Authority, and the Chief of Transit Police (App., p.3a). They are sued in their official capacities.[3/] (Id.).

SWP is a nationwide political party which seeks to bring socialism to the United States through electioneering, distribution of literature and other lawful and orderly means. (App. p.10a). In 1972 the SWP Presidential and Vice-Presidential candidates appeared on the ballot in 23 states. (Id.).

3/ The New York City Transit Authority is a public benefit corporation existing pursuant to §§ 1201 et seq. of the Public Authorities Law of New York. The chairman and the members of the board of the New York City Transit Authority are the chairman and members of the board of the Metropolitan Transit Authority serving ex officio. Id., § 1201(2). The office of Chief of Transit Police is provided for by Subdivision 16 of § 1204. See paragraphs 1 and 6 of the affidavit of John G. de Roos, submitted below by defendants, App. pp.24a-25a.

SWP seeks and finds its constituency largely among the working class (Id., p.11a).

Each week plaintiffs spend up to two hours selling copies of The Militant and Young Socialist newspapers in person in streets and other public places. (App. pp.11a, 14a). Plaintiffs' average weekly sales range from ten papers (App. p.11a), to 40 papers (App. p.14a).

The Militant is a socialist newsweekly published in New York City. The paper began publishing in 1928. A typical issue contains about 30 pages of socialist analysis of current events and trends. In recent years the paper has endorsed all programs and candidates of the SWP. It sells for 25¢ per copy. (App. p.11a).

Young Socialist is published monthly. It was founded in 1957. A typical issue is shorter than The Militant and contains more general articles and somewhat less coverage of current events. Like The Militant, Young Socialist endorses the candidates, platforms and most programs of the SWP. It also sells for 25¢. (Id.).

The papers contain virtually no advertising except as to other socialist literature (Id., p.12a).

Plaintiffs' sole reason for distributing The Militant and Young Socialist is to attempt to communicate socialist ideas and build support for programs and candidates of the SWP (App. pp. 11a, 14a). Plaintiffs do not profit financially from the sales (Id.).[4/]

Plaintiffs' method of selling is to display the papers by hand and offer them to nearby individuals (App. p.16a). If a person seems interested, plaintiffs try to talk to him or her about the content of the papers and about socialism in general. Plaintiffs try to win the individual to their point of view and that of their party (Id.).

Sometimes a headline or photograph on the front page stimulates people into initiating discussions with plaintiffs. Often these discussions result in a sale. Sometimes a purchaser will look over the purchased paper and then return to the seller to discuss the contents. These discussions provide a valuable opportunity for plaintiffs to

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4/ Plaintiffs, together with other local members of the SWP, purchase the papers in bulk from the publishers. The cost is 17¢ per copy for The Militant and 12-1/2¢ for Young Socialist. Each week each plaintiff obtains a supply of papers and distributes as many as possible. Unsold papers and all sale proceeds are returned to local party headquarters. In some weeks there are unsold papers which must be discarded. If the sale proceeds exceed the outlay to the publishers, the entire excess goes to help support the local political activities. (App., p.12a).

explain their party's ideas to people who have no knowledge of them or who have an imperfect understanding of them. (Id.).

Plaintiffs have sold The Militant and Young Socialist in New York City subway stations and desire to continue doing so (App. pp.13a, 15a, 17a).

The subway stations are underground areas containing a variety of facilities and features. In addition to the platforms where passengers await their trains, there are passageways and open areas lined with shops, news stands, shoe shine stands, telephone booths, vending machines, lockers, lunch counters and so forth. (App. p.17a).

Sometimes the stations are crowded and busy and at other times they are not. Sometimes they are nearly deserted. (Id.).

The people in some areas of the stations, such as passageways, are generally moving about. In other areas, such as near the lunch counters, the people are more or less stationary. (Id.).

Subway stations have four qualities which make them desirable places for plaintiffs to sell The Militant and Young Socialist. First the stations contain large concentrations of the working class and lower-income people who

are most receptive to The Militant and Young Socialist and to the ideas, programs and candidates of plaintiffs' party. (App. pp.15a, 13a).

Second, the subway stations are protected from the weather. Plaintiffs' experience is that it is practically impossible to sell on the streets on rainy days or during the winter. (App. pp.15a, 12a).

Third, subway stations contain substantial numbers of people who are waiting around with little to do, and who are therefore especially receptive to plaintiffs' papers and to conversation about socialism. This includes people who are waiting for trains and people who are patronizing the lunch counters, shops and similar facilities that are found in many of the stations. (App. 15a).

Fourth, as to plaintiff Lieberman, subway stations are the only place where he has had significant time to sell papers during the last few months. He has been so busy with other matters that he has had little opportunity to stand on the street or other possible selling locations. However, he spends a substantial amount of time in subway facilities for the purpose of travelling about the city to attend meetings and on other business, and he can use this time for selling papers. (Id.).

In early December, 1974, an officer of the New York City Transit Police ordered plaintiff Wright to stop selling The Militant in the Franklin Avenue IRT station in Brooklyn. The officer threatened to ticket her if she did not obey. (App. p.13a).

On about the same date a Transit Police Officer ordered plaintiff Lieberman to stop selling The Militant in the 110th Street IRT station in Manhattan, and threatened to ticket him if he did not obey. (App. p.16a).

Plaintiffs obeyed these orders (App. pp.13a, 16a).

Upon advice of counsel, and in order to avoid being ticketed or arrested, plaintiffs stopped selling papers in subway facilities pending an attempt to establish their right to do so. Plaintiffs desire to resume selling in subway facilities immediately. (App. p.13a, 16a-17a).

On January 28, 1975, plaintiffs, through counsel, wrote to defendants and notified them of plaintiffs' desire to sell The Militant in the subway stations in the manner described above. Plaintiffs expressed willingness to abide by any reasonable regulations as to specific time and place of selling within the stations. Plaintiffs requested defendants to instruct the Transit Police officers not to interfere

further with the sale of papers by plaintiffs. (App. pp.17a, 18a, 24a).

Defendants denied plaintiffs' request by letter of Mr. John G. de Roos, dated February 13, 1975, on the ground that the "sale of 'The Militant' in the manner you propose is prohibited by Transit Authority regulations. (21 NYCRR Part 1051.)" Mr. de Roos further expressed the opinion that plaintiffs' selling would "interfere substantially" with the "free flow of passenger traffic" and would "thereby create hazardous conditions for subway riders." (App. pp.17a, 20a, 24a).

The existing newsstands in the subways are leased by defendants to Ancorp National Services, Inc., which operates some stands directly and subleases others (App. p.25a). The newsstands do not discriminate against newspapers on the ground of political content, Id., and defendants would not prevent plaintiffs from selling papers to the newsstands. (Id.)

Defendants' prohibition against personal selling applies not only to plaintiffs' papers but also to all other "unauthorized sales and solicitation." (Id.)

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED JURISDICTION OF THE SUBJECT MATTER.

Plaintiffs rest subject matter jurisdiction primarily upon 28 U.S.C. § 1343(4).[5/] That statute confers jurisdiction as to causes of action under federal civil rights statutes without regard to the amount in controversy. Plaintiffs assert a cause of action under 42 U.S.C. § 1983, a civil rights statute.[6/]

5/ § 1343 provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

6/ § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The district court apparently ruled that this action cannot be maintained under § 1983 and that therefore jurisdiction fails under 1343(4). The court stated that "the New York City Transit Authority is not a 'person' within the meaning of 42 U.S.C. § 1983." (App. p.29a)

Plaintiffs did not sue the New York City Transit Authority. Plaintiffs sued the Chief of Transit Police and the Chairman and Members of the Board of the New York City Transit Authority. Compl. ¶ 4, App. p.3a. 7/

Monroe v. Pape, 365 U.S. 167 (1960), cited by the district court at App. p.29a, held that a municipality is not a "person" within the meaning of § 1983. But it is established beyond question that police officials and members of public authorities are "persons" within the meaning of § 1983. See, e.g., Erdmann v. Stevens, 458 F.2d 1205, 1207-8 (2d Cir. 1972) (suit against judges of Appellate Division). See also, Albany Welfare Rights Organization v. Wyman, 493 F 2d 1319 (2d Cir. 1974) (State Commissioner of Social Services and various lesser officials); Wolin v.

7/ Since the complaint seeks only declaratory and injunctive relief, plaintiffs described these parties by their official titles rather than by name, pursuant to Rule 25(d)(2) of the Federal Rules of Civil Procedure.

Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. den. 393 U.S. 940 (1968) (Port Authority, its manager and police chief), to cite only a few of the many such cases. Indeed, in Monroe v. Pape itself the Court upheld a cause of action under § 1983 against police officials.

Moreover, an action would lie under § 1983 even if plaintiffs had sued the Authority instead of certain of its officials. In Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974),[8/] one of the defendants was the New York State Housing Finance Agency. The district court dismissed the complaint for lack of subject matter jurisdiction. This court unanimously reversed and said the following:

> "The State Housing Finance Agency argues that it may not be charged with violation of § 1983. While municipal corporations, that is, municipalities, are not deemed 'persons' under the Civil Rights Act, see Monroe v. Pape, 365 U.S. 167, 187-190, 81 S.Ct. 473, 5 L.Ed2d 492 (1960), 'agencies' have always been so deemed. ..." [Citations omitted.] 500 F.2d at 1255.

The Transit Authority is not a municipality, and there is no reason why it is any less a "person" than the Housing Finance Agency.

8/ Cert. granted as to other issues sub nom New York v. Forman, 43 U.S.L.W. 3399 (1975).

In sum, contrary to the ruling of the court below, the defendants are "persons" within the meaning of § 1983, and therefore § 1343(4) confers jurisdiction of this action. 9/

9/ As jurisdiction under § 1343(4) is clear, we touch only briefly upon the alternative basis under 28 U.S.C. § 1331. The court below held that $10,000 is not in controversy. The court's ruling can be sustained only if it is clear "to a legal certainty" that plaintiffs' claims cannot be valued at the requisite amount. Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, 353 (1961). This test cannot be met. Under recent decisions, the violation of plaintiffs' First Amendment rights is injury enough to draw the requisite amount into controversy. See Spock v. David, 469 F.2d 1047, 1053 (3d Cir. 1972), where the court stated:

> "'Free speech is almost by definition, worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not to be subject to denial.'" (Quoting Cortright v. Resor, 325 F.Supp. 797, 819 (E.D.N.Y. 1971), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. den., 405 U.S. 965 (1972).

In Dellums v. Powell, Civ. No. 2271-71 (D.D.C.), a federal jury recently awarded a $7,500 verdict to each of 1200 persons for violation of their First Amendment rights by District of Columbia officals on Mayday of 1971. N.Y. Times, Jan. 10, 1975, p.1, col. 2. This verdict establishes conclusively that an individual's First Amendment rights are capable of evaluation and that, in an action to redress or prevent violation of those rights, the amount in controversy may well be more than $10,000.

II. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANTS' BAN ON PERSONAL SELLING OF POLITICAL PERIODICALS AT ALL TIMES AND PLACES IS A LEGITIMATE REGULATION OF TIME, MANNER AND PLACE.

The basic issue on the merits is whether the personal selling of papers by plaintiffs in the subway system may constitutionally be prohibited by means of a ban which is sweeping, indiscriminate, and absolute in that plaintiffs are forbidden to sell papers in person in any subway station (no matter how spacious and no matter how filled with other forms of commercial activity), at any location (no matter how far from trains or moving crowds), at any time (no matter how remote from rush hours).

A. The Subway Stations are Appropriate Places For Plaintiffs to Exercise Their First Amendment Freedoms of Speech and Press.

This aspect of the case is controlled by Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. den., 393 U.S. 940 (1968), involving the Port Authority Bus Terminal. In Wolin, the plaintiffs attempted to distribute anti-war leaflets in the Terminal, to converse with interested persons, to display placards and to set

up a card table for display of literature. They were prevented from doing so by the Port Authority police and the Terminal Manager, who threatened arrest if the plaintiffs persisted. The plaintiffs sued for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. District Judge Mansfield enjoined the Authority from banning non-obstructive leafletting. This court affirmed, except that it modified the order to provide similar protection for the conversations, placards and card table, as well as leafletting.

The court rejected the argument that the Terminal was not an appropriate place for the plaintiffs to exercise their First Amendment freedoms. The court first noted that, as in the present case, the Terminal is a "public instrumentality" which is "clearly available to the general public." 392 F.2d at 88-9. The court then posed the following inquiry:

> "Does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza." 392 F.2d at 89.

After analysis the court concluded that the Terminal was an "appropriate place" and, as will appear from the discussion below, the same analysis leaves no doubt that the subway stations are equally appropriate.

The court first rejected the Port Authority's argument that "the Terminal is an inappropriate site for such activity because the interior of a building is not traditionally a place for exercise of First Amendment rights." 392 F.2d at 89. The court stated:

> "The Terminal...is a thoroughfare used by thousands of people each day. It is one of the busiest passageways in the country, with persons hurrying to and from subways, buses, shops, theaters, and other streets. In design and physical appearance, the main concourse resembles a street. The fifty foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others. ...[The people] are in the Terminal for the principal purpose of moving to and from other means of transportation--and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city--but built indoors, with its 'streets' in effect set atop one another, and vehicles operating under, above and to the side, not unlike some futuristic design for urban living." Id.

The court held that, in light of these attributes, the fact that the Terminal area was indoors did not make it an inappropriate place for expression.

The same conclusion is required concerning the subway stations where plaintiffs wish to sell their papers. Like the bus terminal, these stations are used by thousands of people each day, are often lined with stores and concessionaires, are crowded at some hours and less dense at others, are designed for precisely the purpose of transit. Also, no less than the indoor bus terminal, the subway stations are the modern, urban equivalent of the roadside where, "in other times or better climes," people would have gathered to await their means of transportation. Id. Consequently, the fact that the stations are indoors or underground does not make them inappropriate for the distribution of papers.

The court next considered the significance of the activities for which the Terminal was designed. The court held that the "terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with

noisy crowds and vehicles, some unrest and less than perfect order." 392 F.2d at 90. Needless to say, our subway stations easily meet the test of "noisy crowds and vehicles, some unrest and less than perfect order."

The court next took on the Port Authority's argument "that the inappropriateness of the place is demonstrated by the fact that Wolin's message bears no special relation to the operations of the Terminal." 392 F.2d at 90. The court agreed that "the relevance of the premises to the protest" is a material factor. Id. But the court held that the premises were sufficiently relevant because they contained a "relevant audience," even though the plaintiffs' message had no relation to the terminal itself or to the Port Authority. Id. The plaintiffs in Wolin sought two audiences - the general public and servicemen - both of which were present in the Terminal in large numbers. 392 F.2d at 90-91. Likewise, in the present case, plaintiffs' prospective audience is the general public, and particularly the working classes who are present in large concentrations in the subway stations.

In concluding its discussion of this issue the court ruled that "the Port Authority may not abridge [Wolin's] right to choose this place any more than they can control his choice of message." 392 F.2d at 91.

For other cases applying the same principles in similar settings, see, e.g., Chicago Area Military Project v. Chicago, 508 F.2d 921 (7th Cir. 1975) (airport terminal); Kuszynski v. Oakland, 479 F.2d 1130 (9th Cir. 1973) (same); In re Hoffman, 64 Cal. Reptr. 97, 434 P.2d 353 (Sup.Ct. 1967) (in bank) (railroad station); People v. St. Clair, 56 Misc.2d 326, 288 N.Y.S.2d 388 (N.Y. Crim. 1968) (New York City subway station).[10/]

10/ For decisions upholding the general right of citizens to exercise their First Amendment freedoms on government property, see, e.g., Flower v. United States, 407 U.S. 197 (1972) (leafletting on military base); Brown v. Louisiana, 383 U.S. 131 (1966) (silent demonstration on public library); Edwards v. South Carolina, 372 U.S. 229 (1963) (demonstration on state house grounds); Tucker v. Texas, 326 U.S. 517 (1946) (handbilling in government-owned town); United States v. Gourley, 502 F.2d 785 (10th Cir. 1973) (handbilling at Air Force Academy); Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974) (union organizing in welfare office); Spock v. David, 469 F.2d 1047 (3d Cir. 1972) (electioneering on Army Base); Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970) (handbilling on campus of state college).

B. Plaintiffs' Method of Propagating Their Ideas Through the Sale of Papers in Person is Protected by Interlocking Guarantees of Free Speech and Free Press.

The personal selling of papers by the present plaintiffs is protected by the First Amendment, no less than the gratis distribution of leaflets in the Wolin case, supra.

The First Amendment protects the distribution of publications by way of sale, as well as by way of donation.[11/] As the Court stated in Murdock v. Pennsylvania, supra:

> "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." 319 U.S. at 111.

11/ See, e.g., Ginzburg v. United States, 383 U.S. 463, 474 (1966) (sellers of allegedly obscene publications); Smith v. California, 361 U.S. 147, 150 (1959) (retail bookseller); Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495 501-2 (1952) (commercial producer of motion pictures); Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943) (evangelist selling religious publications); Wulp v. Corcoran, 454 F.2d 826, 834-5 n. 13 (1st Cir. 1972) (members of SWP selling newspapers); Hull v. Petrillo, 439 F.2d 1184 (2nd Cir. 1971) (Black Panthers selling party newspaper). Cf., N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964) (publisher of paid advertisement containing non-commercial message).

Further, the Amendment protects plaintiffs' freedom to sell publications in person to members of the public, not merely to news dealers as suggested by defendants.

Personal selling is a method employed by plaintiffs to spread their ideas and build support for their party's policies and candidates. The essence of the method is the conjoining of the sale of papers with personal contact and peaceful discussions.

The value of this conjunctive use of speech and press in attempting to communicate plaintiffs' ideas is manifest. If the publications contain material which stimulates a purchaser's interest or raises a question in his or her mind about socialism, the personal seller is in a position to answer the questions and capitalize on the interest. Such discussion not only improves communications with readers but also provides an opportunity to catch the interest of non-readers who pause to listen. Many of these may well end up buying papers as a result of what they hear. Even if not, many will depart with improved understanding of plaintiffs' program.

Distribution through news stands is no adequate substitute for plaintiffs' method of selling their papers. If limited to news stands, plaintiff would be deprived of personal contact with purchasers and other interested persons and would be prevented from employing speech in conjunction with the sales of their papers.

Interlocking constitutional guarantees of free speech and free press protect plaintiffs' right to employ these elements in conjunction, as well as separately. Cf., Thomas v. Collins, 323 U.S. 516 (1945) at 530:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights [citation omitted], and therefore are united in the First Article's assurance."

In Wolin v. Port Authority, supra, this court squarely held that the plaintiff was entitled to employ several modes of expression in conjunction and that he could not be relegated to only one of the modes. The plaintiff had worked out a method of communication which consisted of distributing leaflets, conversing with interested persons, carrying placards and setting up a card

table for display of literature. The Port Authority prohibited all these activities.

The district court held that the plaintiff's leafletting was protected by the First Amendment and hence could not be prohibited by way of the Port Authority's absolute ban. But the court did not grant relief with respect to the other elements of the plaintiff's method. Both sides appealed.

This court affirmed as to the leafletting but modified the order as to the other elements. The court held that they, too, were immune from the Authority's absolute ban:

> "Whether we speak of placards or conversation or tables laden with literature we deal with forms of communication developed to express the plaintiff's views to the particular audience. The techniques involved here are peaceful and orderly; we deal with an attempt to communicate directly by forms that are classic in simplicity and worthy of emulation. Ronald Wolin does not present us with a program of coercion or defiance of laws or physical confrontation. He asks that he and his associates be permitted to stand with placards and converse with persons who accept their handbills; also, that they be allowed to set their display on tables rather than floors. In this context, such activity is the substance of the 'free trade in ideas' no less than the soapbox orator [citation omitted]. No less than the leaflet, the newspaper, or the oration it

> appeals to 'the power of reason as applied through public discussion,' Whitney v. People of State of California, 274 U.S. 357, 375, 47 S. Ct. 641, 748, 71 L. Ed. 1095 (1927) Brandeis, J. concurring)." 392 F.2d at 92-3.

In sum, like the present case, Wolin involved a method of communication which incorporated mutiple modes of expression, each of which fell within the scope of First Amendment protection. This court held that the district court was mistaken in limiting the plaintiff's relief to the leafletting mode, because the First Amendment protected the plaintiff's use of all of the modes in conjunction.

The same is true of the present plaintiffs' conjunctive use of speech and the sale of papers. Indeed, no method of communication is entitled to a higher degree of First Amendment protection than plaintiffs' method of selling publications by hand in conjunction with personal contact and peaceful discussion, primarily for the purpose of propagating ideas rather than for personal gain. Cf.,

Murdock v. Pennsylvania, supra.[12/]

C. The Sweeping Prohibition of All Personal Selling in Subway Stations is Invalid.

In light of the above discussion, there can be no serious doubt that the sale of The Militant and Young Socialist by plaintiffs in person in the subway stations is an activity within the ambit of First Amendment protection. Yet defendants have imposed a blanket prohibition against all such sales at all times and all places within subway facilities. This indiscriminate prohibition is invalid.

We do not question the power of the state to prevent or punish disruption, fraud or dangerous activities by members of the public who sell papers in subway facilities. Plaintiffs are prepared to observe reasonable

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12/ Murdock involved Jehovah's Witnesses who travelled about seeking to spread their religious doctrine by way of speaking to individuals, playing recordings and selling them publications reflecting the Witnesses' views. As the Court stated:

> "This form of evangelism...is more than preaching; it is more than distribution of religious literature. It is a combination of both." 319 U.S. at 108-9.

regulations designed to avoid these dangers. But defendants may not prohibit all personal selling in order to combat such possible evils.

In Wolin v. Port Authority, supra, the court recognized that:

> "No one can question the legitimate public interest in maintaining a free flow of traffic in the Terminal, in avoiding excessive disruption of normal activities there, in ensuring the convenience and movement of passengers and vehicles." 392 F.2d at 93.

But the court held these legitimate interests to be inadequate to justify a "blanket and wholesale ban" on distribution of leaflets in a place appropriate for political expression. Id. at 92.

In In re Hoffman, supra, the court, per Chief Justice Traynor, recognized the railroad station's legitimate concern with avoiding "chaos, confusion, congested waiting rooms and littered lobbies." 434 P.2d at 357. But, ruled the court, "there are ways to prevent these evils and preserve the primary purpose of terminals... without forbidding the exercise of First Amendment freedoms within them." Id. For example:

> "Congestion can be avoided by controls on activities during peak hours....Reasonable

> and objective limitations can be placed on the number of persons who can be present for First Amendment activities at the same time, and the persons present can be required so to place themselves as to limit disruption. ...In areas normally subject to congestion, such as ticket windows and turnstiles, First Amendment activities can be prohibited....Persons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of passenger or carrier traffic, such as doorways and loading areas." [Citations omitted.] 454 P.2d at 358. 13/

Under the principle of the foregoing decisions, defendants lack power to bar all personal selling of papers by plaintiffs, just as the Port Authority lacked power to bar all handbilling by Wolin. The fact that plaintiffs wish to sell their publications, rather than giving them away is of no significance except that it may provide a basis for defendants to impose regulations which are narrowly drawn to prevent commercial fraud and the like, while preserving plaintiffs' basic right to sell their papers in person in the stations.

13/ For other cases invalidating overbroad restrictions in analogous settings, see e.g., Thomas v. Collins, 323 U.S. 516, 532 (1945); Cantwell v. Connecticut, 319 U.S. 296, 307-8 (1940); Murdock v. Pennsylvania, supra, 319 U.S. at 116-17; Chicago Area Military Project v. Chicago supra, 508 F.2d at 926; Kuszynski v. Oakland, supra, 479 F.2d at 1131; Jones v. Board of Regents, supra, 436 F.2d at 620; People v. St. Clair, supra, 56 Misc. 2d at 329, 288 N.Y.S. 2d at 392.

The cases cited by the district court, App. p. 30a, do not support its ruling that defendants may constitutionally "regulate" plaintiffs' personal selling by banning it altogether. 14/

In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the plurality and concurring opinions held that the First Amendment does not protect expression by means of car cards affixed to transit vehicles. The key premise for this decision is the fact that riders are a "captive audience" for billboard-type ads. See 418 U.S. at 302, 304 (plurality opinion) and 307-8 (concurring opinion). Unlike a radio (which can be turned off) or a newspaper (which can be discarded), the billboard cannot be avoided. 418 U.S. at 302, 307.

14/ The district court also cited Transit Authority regulations § 1051.9 concerning peddling and Section 240. 35(7) of the N.Y. Penal Law concerning certain unauthorized loitering in transportation facilities. (The provisions are reproduced in an appendix to this brief). Insofar as defendants construe their regulation to require a total ban on personal selling by plaintiffs, the regulation is invalid. Plaintiffs need not and do not attack the validity of § 240.35(7) of the Penal Law, because plaintiffs do not seek to sell without authorization. This litigation was prompted by defendants' refusal to grant the authorization which plaintiffs requested and to which they are constitutionally entitled. Plaintiffs challenge defendants' constitutional power to withhold the authorization requested by plaintiffs, but plaintiffs do not attack enforcement of the statute where authorization is lawfully withheld.

Lehman is not relevant here, because plaintiffs do not seek to use display ads or otherwise to communicate with a captive audience. Subway users are at liberty not to converse with plaintiffs, not to buy plaintiffs' papers and to close or discard a purchased paper at any time. See Chicago Area Military Project v. Chicago, supra, 508 F.2d at 926, where the court held Lehman inapplicable to leafletting in the airport for the reasons stated above.

Lloyd v. Tanner, 407 U.S. 551 (1972) is inapposite because it dealt with the conditions under which the owners or occupants of a private shopping center are subject to First Amendment strictures. As the Seventh Circuit recently stated in Chicago Area Military Project v. Chicago, supra:

> "Lloyd Corp. v. Tanner, supra, which merely clarified the extent of the application of the First Amendment to private property, is also inapplicable. That case involved a privately owned shopping center mall. In that case the owners were not required by the Court to permit handbilling on a controversial subject unrelated to their enterprise. The only similarity of that case to this one is the commercial nature of the airport facility. However, the plaintiffs do not here claim any right to distribute leaflets on airplanes or in other privately owned or leased places but only in the spacious, city-owned common areas...."
> 508 F.2d at 925.

In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Court upheld an ordinance banning noisy demonstrations near public schools because it was "narrowly tailored" to avoid "conduct which disrupts or is about to disrupt normal school activities." 408 U.S. at 119. The decision in no way supports the present ban which - far from being "narrowly tailored" - indiscriminately covers times and places at which personal selling would not be disruptive or create any other appreciable problems. 15/

III. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS FAILED TO DEMONSTRATE IRREPARABLE INJURY.

The district court did not suggest that the requested relief would harm defendants or be adverse to the public interest. Rather than balancing equities, the

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15/ The same is true of United States v. O'Brien, 391 U.S. 367 (1968), involving an individual who burned his draft card as an act of protest. The Court upheld his conviction under a federal statute which barred destruction or mutilation of draft cards. The Court held that the prohibition against mutilation was "an appropriately narrow means" of protecting the government's interest in operation of the Selective Service System. 391 U.S. at 382.

court simply held that plaintiffs would not be irreparably injured if prohibited from selling papers during the balance of the litigation. (App. p. 29a.) This ruling is erroneous as a matter of law.

A prohibition upon expression, without more, gives rise to irreparable injury which is cognizable in equity, "because there is no means to make up for the irretrievable loss of that which would have been expressed." 414 Theatres Corp. v. Murphy, 499 F.2d 1155, 1160 (2nd Cir. 1974). See also Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 (2nd Cir. 1974), cert. granted, 43 U.S.L.W. 3399 (1975); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969). Cf., Wolin v. Port Authority, supra, 392 F.2d at 94, where the court said: "These rights are as effectively stifled by delay as by suppression."[16/] So here, during each continued week of defendants'

16/ In Wolin, this court granted a de facto interlocutory injunction. The court ordered the district judge to retain jurisdiction until the Port Authority could promulgate constitutionally valid regulations. But meanwhile this court ordered that the plaintiffs be permitted to carry on their leafletting and other activities in the Terminal, "consistent with the standards set forth above." 392 F.2d at 94.

prohibition, plaintiffs are prevented from propagating their views through personal selling of publications in the subways. There is no way to compensate for the lost personal encounters and sales. It follows that plaintiffs established irreparable injury, and the court's contrary ruling was clearly erroneous. 17/

17/ The cases cited by the court at App., p. 29a, do not support its ruling. In Hull v. Petrillo, 439 F.2d 1184 (2nd Cir. 1971), the plaintiff Black Panthers sought a preliminary injunction against an alleged campaign of police harassment. There was testimony in affidavits which set forth a number of encounters between the plaintiffs and the police, but there was no evidence that these encounters were part of a harassment campaign - the key issue in the case. Consequently, "since neither the level nor very existence of effective harassment is beyond question," the court declined to disturb the district judge's denial of preliminary relief. 439 F.2d at 1189. This ruling merely upholds a refusal to enjoin the defendants from doing something which they denied doing in the first place, and of which the plaintiffs had no evidence. In the present case, by contrast, defendants' practices and regulations concerning plaintiffs are clearly established and are not in dispute.

Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972), did not involve preliminary injunction. Rather, the plaintiff appealed from an order denying his motion for summary judgment in the form of permanent injunction, and dismissing his complaint. The First Circuit reversed and declared the challenged ordinance unconstitutional, but affirmed insofar as the lower court denied permanent injunction. The court saw no need for an injunction because "there is no evidence before us that would indicate that defendant will not accept in good faith this final determination of the ordinance's unconstitutionality." 454 F.2d at 835. By contrast the present

Normally, even when irreparable injury is shown, a district judge has discretion in balancing the equities and determining whether to grant or deny preliminary injunction. See, e.g., Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 536-7 (2nd Cir. 1974). But where, as here, the undisputed evidence clearly establishes an ongoing violation of constitutional rights pendente lite, the court has no discretion to deny relief. See, e.g., Henry v. Greenville Airport Comm., 284 F.2d 631 (4th Cir. 1960). See also Albany Welfare Rights Organization v. Wyman, supra, where this court reversed a denial of preliminary injunction in a setting similar to this case.

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17 cont'd./ regulations have not yet been invalidated as to plaintiffs' proposed activities, and defendants have indicated that they will continue to enforce them.

In Kissinger v. N. Y. City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967), the court denied a motion for summary judgment because of factual dispute. There was no discussion of irreparable injury or other factors bearing upon preliminary injunction.

In any event, the record reveals no equity on defendants' side, as suggested by the district court's failure to refer to any. In conclusory terms, defendants argued that a ruling for plaintiffs would result in danger to subway passengers (App. p.25a), but these unsupported speculations defy reason.

Plaintiffs have not sought and do not seek authority to act in a disruptive or dangerous manner. Plaintiffs have never disputed defendants' authority to utilize regulations which are really necessary to avoid danger to passengers. But defendants' wholesale ban is not needed for that purpose. Manifestly, there are times and places within the subway system at which the personal selling of publications by plaintiffs will not create danger. Plaintiffs seek relief from defendants' regulations only insofar as they ban selling at those times and places.[18/]

18/ The decretal portion of plaintiffs' proposed injunction reads:

> "O R D E R E D that the defendants Chairman and Members of the Board of the New York City Transit Authority, and the Chief of Transit Police, their agents, subordinates and privies, and all persons acting in concert with them or with knowledge of this order, are hereby enjoined from enforcing an absolute prohibition against the sale of socialist periodicals by plaintiffs Pat Wright and Jack Lieberman in person to members of the public within the New York City subway system, pending final judgment; provided that this order shall not prevent enforcement of reasonable regulations as to the specific times, manner and places of such selling within the said system."

The public interest would be promoted by granting the relief requested below. Public policy opposes restrictions upon the orderly dissemination of ideas in public places, as evidenced by the adoption of the First Amendment by the people. See, e.g., Wolin v. Port Authority, supra, 392 F.2d at 93 n.14, and accompanying text.

CONCLUSION

For the reasons stated, the order of the district court should be reversed and the case remanded with instructions to issue a preliminary injunction as requested by plaintiffs.

Respectfully submitted,

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APPENDIX

Section 1051.9(a) of the Regulations of the Metropolitan Transit Authority provides:

> "(a) No person shall in any transit facility or upon any part of the New York City transit system, exhibit, sell or offer for sale, hire, lease or let out any object or merchandise, or anything whatsoever, whether corporeal or incorporeal."

Section 240.35 of the New York Penal Law provides:

> "A person is guilty of loitering when he:
>
> . . .
>
> 7. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; ..."